



Virginia
Regulatory
Town Hall

Final Regulation Agency Background Document

Agency Name:	State Water Control Board
VAC Chapter Number:	9 VAC 25-195-10 et seq.
Regulation Title:	General VPDES Permit Regulation for Concentrated Aquatic Animal Production Facilities
Action Title:	Repeal of General VPDES Permit Regulation for Concentrated Aquatic Animal Production Facilities
Date:	December 11, 2002

Please refer to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99) , and the *Virginia Register Form, Style and Procedure Manual* for more information and other materials required to be submitted in the final regulatory action package.

Summary

Please provide a brief summary of the new regulation, amendments to an existing regulation, or the regulation being repealed. There is no need to state each provision or amendment; instead give a summary of the regulatory action. If applicable, generally describe the existing regulation. Do not restate the regulation or the purpose and intent of the regulation in the summary. Rather, alert the reader to all substantive matters or changes contained in the proposed new regulation, amendments to an existing regulation, or the regulation being repealed. Please briefly and generally summarize any substantive changes made since the proposed action was published.

The VPDES General Permit Regulation for Concentrated Aquatic Animal Production Facilities established a general permit for fish farms that sets forth guidelines for the permitting of wastewater discharges from fish farms and hatcheries and established limitations and monitoring requirements for flow, total suspended solids and settleable solids. The regulation also set forth the minimum information requirements for all requests for coverage under the general permit. The regulation in proposed form was for amendment to reissue the general permit for another five year term after the permit expiration date of March 5, 2003. Subsequent to review of the regulation and public comments the VPDES General Permit for Concentrated Aquatic Animal Production Facilities is being repealed.

Statement of Final Agency Action

Please provide a statement of the final action taken by the agency: including the date the action was taken, the name of the agency taking the action, and the title of the regulation.

The State Water Control Board approved the repeal of this regulation at its January 6, 2003 meeting.

Basis

Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority, shall be provided. If the final text differs from that of the proposed, please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the final regulation and that it comports with applicable state and/or federal law.

The basis for this regulation is § 62.1-44.2 et seq. of the Code of Virginia. Specifically, § 62.1-44.15(5) authorizes the Board to issue or revoke permits for the discharge of treated sewage, industrial wastes or other waste into or adjacent to state waters and § 62.1-44.15(7) authorizes the Board to adopt rules governing the procedures of the Board with respect to the issuance of permits. Further, § 62.1-44.15(10) authorizes the Board to adopt such regulations as it deems necessary to enforce the general water quality management program, § 62.1-44.15(14) authorizes the Board to establish requirements for the treatment of sewage, industrial wastes and other wastes, § 62.1-44.16 specifies the Board's authority to regulate discharges of industrial wastes, § 62.1-44.20 provides that agents of the Board may have the right of entry to public or private property for the purpose of obtaining information or conducting necessary surveys or investigations, and § 62.1-44.21 authorizes the Board to require owners to furnish information necessary to determine the effect of the wastes from a discharge on the quality of state waters. Section 402 of the Clean Water Act (33 USC 1251 et seq.) authorizes states to administer the NPDES permit program under state law. The Commonwealth of Virginia received such authorization in 1975 under the terms of a Memorandum of Understanding with the U.S. EPA. This Memorandum of Understanding was modified on May 20, 1991 to authorize the Commonwealth to administer a General VPDES Permit Program.

The Office of the Attorney General has certified that the Board has the statutory authority to repeal the regulation.

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the final regulatory action and detail the specific reasons it is

essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.

The purpose of the original regulatory action was to amend the regulation to reissue it for another five year term. The purpose now is to repeal the existing regulation.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement of the regulatory action’s detail.

The general permit established limitations and monitoring requirements for point source discharges from fish farms and other aquatic animal production facilities.

Issues

Please provide a statement identifying the issues associated with the final regulatory action. The term “issues” means: 1) the advantages and disadvantages to the public of implementing the new provisions; 2) the advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please include a sentence to that effect.

The primary advantage to citizens and the agency of repealing this regulation is that a regulation that is not fulfilling its purpose will be done away with, and the agency will be able to more fully fulfill its mission through more individualized control of fish farm discharges that have caused degradation in state waters. The primary disadvantage to the permitted facilities and to the agency of repealing this regulation is that there will no longer be the simpler option for obtaining VPDES permit coverage afforded by a general permit.

Statement of Changes Made Since the Proposed Stage

Please highlight any changes, other than strictly editorial changes, made to the text of the proposed regulation since its publication.

No changes have been made to the text of the regulation since the proposed stage. Instead, a decision to repeal the regulation has been made.

Public Comment

Please summarize all public comment received during the public comment period and provide the agency response. If no public comment was received, please include a statement indicating that fact.

Summary of comments and agency responses:

1. **Comment:** The original idea for this general permit came from one of the permittees who would be denied coverage under the new general permit regulation as drafted.

Response: Regardless of where the idea for the general permit came from, DEQ was directed to issue a general permit and adopted a regulation to establish one in accordance with the Administrative Process Act and the Virginia VPDES Permit Regulation. It might be noted that only eleven facilities have registered for coverage in the five years the general permit has existed which would seem to indicate that the general permit is unnecessary.

2. **Comment:** The draft amendment of the general permit regulation should not include the sentence listed as item D. under 9 VAC 25-195-30 which states "The owner shall not be authorized by this general permit to discharge to state waters that are listed as impaired in the current Total Maximum Daily Load Priority List (303(d) list;" and facilities discharging to waters listed as impaired should not be disqualified from coverage under the general permit.

Response: Item D. under 9 VAC 25-195-30 continues to state: "...unless it is determined that the proposed effluent does not cause or contribute to the listed impairment;". As of this writing, six trout facilities are discharging to state waters listed as impaired for benthic impacts resulting from solids discharges, and the trout facilities are listed as the source of impairment. As required by federal and state regulation, the impaired streams will be assigned a Total Maximum Daily Load (TMDL) for solids and the facilities on that segment will be assigned site-specific water quality limits. General permits do not accommodate site-specific limits. The VPDES Permit Regulation under 9 VAC 25-31-170 requires that general permit water quality limits be the same for all covered facilities, and provides that the permitting authority can exclude facilities from coverage as necessary. A general permit with facility specific limits defeats the purpose of a general permit.

3. **Comment:** The trout hatchery TMDL was performed for political reasons and the impairment designation is based on unsound science. The TMDL study is flawed.

Response: The impairment designation and subsequent TMDL study are a separate regulatory procedure. The regulatory action for which we are seeking public comment is reissuance of the fish farm general permit. This regulatory action has no control over TMDL issues and does not provide a means of changing impairment designations or TMDLs.

4. **Comment:** Not being able to continue with the general permit program is a huge negative. We do not know what the individual permit will entail, nor the extent of added and ongoing costs to our operations.

Response: It does not appear that the agency has any option other than to require an individual VPDES permit for these facilities. However, a few points require clarification. As agricultural operations, the trout facilities are exempt from permit fees, whether they are general or individual permits. The difference in costs for obtaining an individual VPDES permit is only the cost of payment for public notice that is the responsibility of a VPDES permit applicant. As far as additional costs due to individual VPDES permit requirements such as monitoring or treatment to meet effluent limits it should be noted that general and individual permits are both VPDES permits. They both require that the permitting authority protect water quality and implement applicable water regulations. Any requirement in an individual permit that is necessary to protect water quality would be something that should also be included in a general permit, and if the TMDL facilities were covered by the general permit it would have to contain the same effluent limits as an individual permit. General permits are not adopted to provide regulatory relief to covered facilities. They are adopted simply to provide convenience to the permitted facilities and to the permit writing agency in providing permit coverage to a large group of dischargers all having the same permit requirements to protect water quality. In the processing of an individual VPDES permit the owner will be provided with a copy of the draft and an opportunity to comment before the permit is issued, as is the case with any VPDES applicant in the state. The individual VPDES permit can also include a compliance schedule allowing the permittee time to take any steps necessary to meet new requirements.

5. **Comment:** We have been given less than 30 days to apply for an expensive individual permit.

Response: It is the same permit, only a site specific one instead of one issued to all trout facilities. See the response to Comment 4 regarding the expense. The application being sought by DEQ is simple and requires minimal information. Because TMDL facilities cannot be covered by a general permit they will have to be covered by an individual permit by the expiration date of the general permit, March 5, 2003. Due to the lengthy process of issuing an individual permit the regional office is trying to secure an application as soon as possible in order to prevent the trout farm from being in the position of discharging without a permit, a state and federal offense.

6. **Comment:** If DEQ policy makes trout culture any less profitable the lands may be put to uses that are less environmentally desirable and water quality will diminish.

Response: DEQ has no control over land use but must protect state water quality with what regulations it has authority to enforce.

7. **Comment:** DEQ has to consider the potential impact of regulatory action on families. Imposition of multi-thousand dollar water treatment facilities will discourage economic self-sufficiency, self pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents, will decrease disposable family income and possibly erode the marital commitment. I have little respect for people that have more concern for a mayfly maggot than for human children and families.

Response: The DEQ action that prompts this comment is requiring that facilities listed as impairment sources on impaired waters obtain individual VPDES permits rather than coverage under a general VPDES permit. See response to Comment 4.

8. **Comment:** EPA has given no guidance to DEQ requiring DEQ to force dischargers on impaired streams to obtain individual permits.

Response: There is no EPA guidance specific to forcing dischargers on impaired streams to obtain individual permits, and DEQ does not claim that there is. What DEQ has indicated is that EPA and state regulations do not allow for site-specific water quality limits in general VPDES permits, that EPA must review and approve the general permit, and that EPA insists on reviewing all TMDL related permits.

9. **Comment:** There appears to be some discrimination in choosing which trout streams to perform the TMDLs. Trout culture was ignored in the state except for in Valley Regional Office. The laws and regulations of Virginia are to be applied fairly and evenly across the state. Fairness and equal application of your ruling cannot be found. The three impacted farmers will now be placed at a considerable competitive disadvantage.

Response: All of the privately owned trout farms that registered for general permit coverage are located within the boundaries of the Valley Regional Office. However, we will address the fairness issue. We will most likely require individual VPDES permits for all of the trout facilities, not just those on impaired waters. The best way to accomplish this is by abolishing the general permit since it would now cover only four facilities.

10. **Comment:** We are opposed to being forced to foot the bill for experimental and unproven technologies without evidence that these expenses and actions will have any effect on our streams.

Response: The subject of the hearing is reissuance of the general permit, and the issue here is removal of general permit coverage for impairment sources due to documented impacts in the stream. Whether by general or individual VPDES permit, wastewater discharges into state waters are limited so as to maintain water quality standards. As with any other discharger in the state it is up to the permittee to decide how best to meet the effluent limitations and requirements of the permit either through Best Management Practices or treatment. No experimental or unproven technologies will be forced on the trout facilities. If waste treatment is necessary, the most appropriate treatment would be solids removal through simple settling or screening. These technologies have been around for decades and abundant information and performance data is available.

11. **Comment:** DEQ has ignored the environmental enhancements afforded by the presence of trout culture operations, has not given credit for tons of organic detritus and sand and silt that the operations filter out of state waters, and has not followed EPA guidance of stepping back and looking at the entire picture. This is not a water quality issue. We have never violated the water quality standards that have been set before us.

Response: Trout require high quality waters in which to thrive. However, larger than normal concentrations of fish are held at fish farms, producing higher than normal solids discharges. Regardless of the amount of impact, the general permit reissuance has to respond to regulations that listed the receiving waters as impaired due to the trout farms. The impairment is from solids depositions which violate the narrative general standard. Such solids depositions, if they occurred during the term of the present general permit would also violate special condition 5. of the permit, which says: "Organic solids shall not be discharged in amounts which cause stream bed accumulations or degradation of State waters as determined in accordance with standard procedures." The fact that there are no documented violations of the general permit numeric effluent limitations may indicate that the general permit limits are insufficient to protect water quality.

12. **Comment:** One possible solution to the disconcertment you are causing us is to grant Virginia's trout culturists a waiver or exemption from the state ruling requiring us to obtain individual permits while allowing us to continue operation under the general permit until these issues can be satisfactorily resolved.

Response: DEQ does not have authority to provide a waiver or exemption from state regulation, which requires that general permits with water quality limits impose the same limits on all covered facilities. Also, if a general permit could be written with one water quality limit to cover all the facilities it would have to contain the same requirements as an individual permit to protect water quality, since both types of permits perform the same function, so there is no difference.

13. **Comment:** A second solution would be for DEQ to recall the flawed TMDL study.

Response: This rulemaking is for reissuance of the general permit and has no control over the TMDL study which was conducted under a separate rulemaking process.

14. **Comment:** A third solution would be to allow the trout culturists to continue with the general permits while at the same time addressing issues with the TMDLs.

Response: See responses to Comments 2 and 4.

15. **Comment:** A fourth palatable option, if individual permits are inevitable, would be for DEQ to be responsible for the funding to finance the experimental BMPs.

Response: Experimental BMPs are not being imposed. See the response to Comment 10. Also note that when this general permit was first adopted, DEQ disbursed fund money for a BMP study by Virginia Tech. See "Final Report: The Characterization, Treatment and Improvement of Aquacultural Effluents", Gregory D. Boardman, et al, VPI and SU, October 23, 1998. Fish farms used in the study included those of the commenter, so the study results and the BMPs developed would be locally applicable. To our knowledge, none of these BMPs were implemented. At present, DEQ is not aware of any further funds available to assist trout farms but will notify the permittees if this changes.

16. **Comment:** A fifth solution would be to create a general permit which would include a list of applicable and appropriate BMP options from which all hatcheries could choose to eliminate the need for individual permits.

Response: A VPDES permit is a regulating document. It normally provides to the permit holder identification of the regulatory target or end result as far as water quality effluent limitations, and does not specify how the permit holder must meet them. Optional BMPs would best be listed outside of the permit, and these are already available. Again, if multiple options are necessary in a general permit to cover multiple sites it would seem to indicate that a general permit is not appropriate. Given the few fish farms that have registered for coverage under the present general permit and the need for site specific requirements this general permit should not be reissued at all.

17. **Comment:** DEQ has decided that trout farms in our region of the state will be the first farms required to have no effect on the environment. By requiring us to apply for a permit whose requirements are unknown and subject to change at the whim of DEQ we are stripped of all property rights.

Response: The only trout farms that have registered for general permit coverage are in this region of the state. The farms that have been studied have been found to be causing water quality problems. The permit that is to be applied for is the same permit (VPDES) that the commenter has had, but in individual rather than general form. See above responses.

18. **Comment:** A review of potential impacts to natural heritage resources including threatened and endangered species should be a part of the general permitting process, including review of sludge application and disposal activities.

Response: A review of potential impacts to natural heritage resources including threatened and endangered species will be made during the reissuance of the general permit, or during review of the individual registration statements if this general permit is reissued.

19. **Comment:** The proposed general permit regulation states that "The owner shall not be authorized by this general permit to discharge to state waters that are listed as impaired in the current Total Maximum Daily Load Priority List (303(d) list unless it is determined that the proposed effluent does not cause or contribute to the listed impairment." What methodology will be used to determine this and who will make the determination?

Response: This general permit, if reissued, could conceivably be used by a fish farm facility in waters that are listed as impaired due to some other water quality parameter besides solids. If a facility does not discharge the parameter for which a segment is listed it will be considered as not causing or contributing to the listed impairment and coverage will not be denied. The regional permit writer will make this determination based on the listed impairment.

20. **Comment:** Owners of general permits should not have to obtain or switch to individual permits just because they discharge to a TMDL listed impaired water segment, especially when the operation has no record of permit violations.

Response: The facilities in question are listed as the cause of impairment of the segment. If there are no violations of the general permit and yet the facilities caused stream impairments then the requirements of the general permit must not be sufficient to protect water quality.

21. **Comment:** The proposed language states that the owner may no longer operate under a general permit unless it is determined that the proposed effluent does not cause the impairment. We believe this determination should be based on sound and scientific data.

Response: See response to Comment 19. If a facility is discharging the pollutant for which a stream segment is listed as impaired, then it will be considered as having the potential to cause or contribute to the impairment. In the case of the above discussed trout facilities that are on impaired waters, the stream segment is listed as impaired due to solids discharges, the trout facilities discharge solids, and the trout facilities are listed as the cause of stream impairment.

22. **Comment:** Owners need to be applying now for their individual permits to meet the deadline, however there are uncertainties of what the individual permit will look like or require of the owner. We recommend that the requirements of water quality regulations be fully researched before landowners are subjected to loss of resources or exorbitant implementation and maintenance costs.

Response: As with all individual VPDES permits, the owner is provided a copy of the proposed permit once it is drafted and is provided with an opportunity for comment. The VPDES permit will contain no more stringent requirements than necessary to protect water quality. The only requirements in the permit that are anticipated at this time are the TMDL requirements, and DEQ is required by law to include these requirements.

23. **Comment:** Because of expected costs associated with the individual permit process and the unknown and unproven BMPs that will be required to comply with the individual permit the trout industry in the Commonwealth will undergo a severe economic impact and hardship.

Response: See response to Comment 4

Detail of Changes

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or crosswalk - of changes implemented by the proposed regulatory action. Include citations to the specific sections of an existing regulation being amended and explain the consequences of the changes.

The General VPDES Permit for Concentrated Aquatic Animal Production Facilities expires on March 5, 2003. The staff has been working on the regulation amendment to reissue this general permit. However, due to a small number of facilities that have registered for coverage and due to water quality impacts from some of these facilities, the staff has made a decision to repeal this general permit regulation and thus not reissue the general permit.

Background:

9 VAC 25-195 was adopted in December 1997. It establishes a general VPDES permit for concentrated aquatic animal production facilities, a federal regulatory term for fish farms. According to state and federal regulation, VPDES permitting is required only for facilities that produce above a threshold of 20,000 pounds annually for coldwater fish, and 100,000 pounds annually for warmwater fish. The pollutant of concern with fish farms is solid matter that results from confinement of large concentrations of fish in a small area.

Upon reviewing performance under the current general permit the following findings were made:

1. Only trout farms have registered for coverage under the current general permit. Evidently there are no warmwater fish farms in the state that produce over 100,000 pounds annually.
2. Only 11 trout farms have registered for coverage under the general permit. Of these, 8 are commercial and 3 are state hatcheries.
3. Of the 11 covered facilities, 6 discharge to impaired waters and are listed as the source of impairment on the 303(d) list. The impairment is to benthics from solids accumulations, in violation of the narrative general water quality standard.
4. In response to the impaired waters listing, a Total Maximum Daily Load (TMDL) limit for solids must be established. This will result in different limits for each facility.
5. Our operating regulations do not prohibit us from putting TMDL limits in general permits, but they do require that water quality limits in general permits be the same for all covered facilities. For this reason the 6 facilities that discharge to impaired waters would not be covered by the reissued general permit.

There seems to be a perception within the industry that going from a general VPDES permit to an individual VPDES permit will be more costly and will involve a larger regulatory burden. However, the industry is exempt from permit fees either way (agricultural exemption) and with either an individual permit or a general permit whatever requirements are necessary to protect water quality must be imposed. Nonetheless, a fairness issue has arisen since the 6 facilities that have been studied and listed as impairment sources feel they are being treated differently than facilities that have not been studied.

A reissued general permit would cover only 5 facilities. If we do not reissue the general permit these 5 facilities will require individual permits in addition to the 6 facilities on impaired waters. Site-specific requirements are apparently necessary in order to protect water quality in permitting this type of facility. Requiring all of the trout farms to obtain individual permits would thus better address water quality protection and would seem to address the fairness issue as well. For these reasons the staff believes it is best to not reissue the general permit and to repeal the regulation establishing it. All of the facilities that will be impacted have been

notified of this and have been advised to submit applications for individual VPDES permits to be issued prior to March 2003.

Family Impact Statement

Please provide an analysis of the regulatory action that assesses the impact on the institution of the family and family stability including the extent to which the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

It is not anticipated that this regulation will have a direct impact on families.